

***United States Court of Appeals  
for the Second Circuit***



**JOINT APPENDIX**



76-6139

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
Appeal Docket No. 76-6139

*B.H.*  
JAMES F. REGAN,

Plaintiff-Appellant

-against-

JOSEPH F. SULLIVAN, GEORGE VAN NOSTRAND,  
FRANCIS R. JULES, and DONALD J. GRATAN,

Defendants-Appellees

and

JOHN CALLAGHAN, individually and as a  
member of The New York City Police  
Department, JAMES M. HARKINS, individ-  
ually and as a member of The New York  
City Police Department and HOWARD  
GREENWALD, individually and a a member  
of The New York City Police Department,

Defendants

On Appeal from the United States District Court For the Eastern  
District of New York

JOINT APPENDIX

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Joan Ross Sorkin  
Of Counsel

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Assistant U.S. Attorney  
Of Counsel

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Joseph F. Sullivan, George Van  
Nostrand, Francis R. Jules, and  
Donald J. Grattan  
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Brooklyn, N.Y. 11201



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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
----- X

BEST COPY AVAILABLE

JAMES F. REGAN, :  
Plaintiff, :  
-against- : 75 C 139  
JOSEPH F. SULLIVAN, et al., :  
Defendants. :  
----- X

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

X

JAMES F. REGAN,

Plaintiff,

75 Civ. 139

-against-

THE UNITED STATES OF AMERICA; EDWARD BOYD, individually and as Assistant United States Attorney for the Eastern District of New York; JOSEPH F. SULLIVAN, individually and as a Special Agent of the Federal Bureau of Investigation; GEORGE VAN NOSTRAND, individually and as a Special Agent of the Federal Bureau of Investigation; FRANCIS R. JULES, individually as a Special Agent of the Federal Bureau of Investigation; DONALD GRATIN, individually and as a United States Customs Agent, United States Customs Service; JOHN F. CALLAGHAN, individually and as a member of the New York City Police Department; JAMES M. HARKINS, individually and as a member of the New York City Police Department; and HOWARD GREENWALD, individually and as a member of the New York City Police Department,

PLAINTIFF  
DEMANDS  
TRIAL BY  
JURY

AMENDED  
COMPLAINT

Defendant.

:

X

I. JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28 U.S.C. §§1331 and 1343. This suit is authorized by the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution and Title 42 U.S.C. §§1983 and 1985. Plaintiff seeks monetary recovery in excess of \$10,000 for damages incurred by him.

II. PARTIES

2. Plaintiff James F. Regan is a citizen of the United States who resides in Suffolk County, State of New

York. Said plaintiff is employed as a cargo handler for Seaboard World Airlines at J.F.K. International Airport, Jamaica, County of Queens, State of New York.

3. Defendant Edward Boyd was at all material times an Assistant United States Attorney for the Eastern District of New York. His business address was 225 Cadman Plaza East, United States Courthouse, Brooklyn, New York. Said defendant was responsible for complaints filed and warrants issued to federal law enforcement officers in the Eastern District of New York. Said defendant is sued both individually and in his official capacity.

4. Defendants Joseph F. Sullivan, George Van Nostrand and Francis R. Jules were at all material times and are Special Agents, Federal Bureau of Investigation, J.F.K. International Airport, Jamaica, County of Queens, State of New York. Each defendant is sued individually and in his official capacity.

5. Defendants John F. Callaghan, James M. Harkins and Howard Greenwald were at all material times members of the New York City Police Department. Upon information and belief, defendant John F. Callaghan is a former detective in the New York City Police Department; defendant James M. Harkins is a sergeant in the Queens County Detective Area Homicide Squad of the New York City Police Department; and defendant Howard Greenwald is a member of the Queens County Detective Area Robbery Squad of the New York City Police Department. Each defendant is sued both individually

and in his official capacity.

6. Defendant Donald Gratin was at all material times and is a United States Customs Agent, United States Customs Service, J.F.K. International Airport, Jamaica, County of Queens, State of New York. Said defendant is sued both individually and in his official capacity.

### III. INCIDENTS AT ISSUE

7. On or about November 15, 1973, at about 6:00 P.M., defendants Sullivan, Van Nostrand, Jules, Callaghan, Harkins, Greenwald and Gratin came to plaintiff's place of employment at J.F.K. International Airport, and to plaintiff's great personal distress and business damage, physically seized him, took his car keys and locker keys, searched his automobile, searched his locker and took him in custody to the office of the F.B.I. at the airport, and thereafter to the presently-unknown Precinct in Queens County, New York City, all without a warrant of any kind or description, including either a warrant to search his property or to arrest him and hold him in custody, and without probable cause.

8. On or about November 15, 1973, and continuing into November 16, 1973, defendants Sullivan, Van Nostrand, Jules, Callaghan, Harkins and Greenwald held plaintiff in custody in the unknown police station, at the West Street Federal House of Detention, New York, New York, and at the United States Courthouse in Brooklyn, New York.

9. After being unlawfully taken into custody and for more than two hours prior to being given Miranda

warnings as required by law, plaintiff was unlawfully searched to great personal discomfort, and unlawfully and menacingly questioned at length by defendants Sullivan, Van Nostrand, Jules, Callaghan, Harkins, Greenwald and Gratin without having been given any explanation whatsoever other than being told by the officers that they knew him and all about him.

10. Subsequent to being given certain warnings, and until late in the night plaintiff continued to be interrogated, photographed and fingerprinted to great personal distress and in the absence of counsel. Such interrogation and harassment did not cease for more than five hours from the time he was originally taken into custody.

11. Upon information and belief, on or about November 16, 1973, after the events alleged in paragraphs 7 through 10, supra, defendant Boyd authorized the filing of a criminal complaint against plaintiff which alleged that said plaintiff on or about November 12, 1973 did wilfully and unlawfully participate in an armed robbery, in which merchandise moving in foreign commerce having a value of more than \$100.00 was stolen, in violation of the laws of the United States.

12. Plaintiff was arraigned before a United States Magistrate in the Eastern District of New York on the criminal complaint alleged in paragraph 11, supra, and held in custody until a bail bond of \$25,000 could be raised and posted.

13. On November 17, 1973, there was caused to appear in the Long Island Press, and Newsday, articles

stating that plaintiff had been arrested and charged with robbing a warehouse near Kennedy Airport. These articles caused great personal distress and business damage to the plaintiff. Copies of said articles are annexed hereto as Exhibits A and B.

14. On November 27, 1973, the criminal complaint was dismissed upon the motion of the United States Attorney's office.

15. On various dates thereafter, and continuing up to the present date, defendants have caused photographs of plaintiff, which were taken illegally and in violation of his rights, to be shown to various persons.

16. As a result of the foregoing, plaintiff suffered and continues to suffer great humiliation, embarrassment and physical and mental suffering, as well as loss of reputation in and amongst his business associates, friends and family.

17. All of the foregoing was done, was caused to be done, and is being done and is being caused to be done by virtue of a conspiracy by said defendants without just cause, unlawfully, and unreasonably and contrary to law.

FOR A FIRST CAUSE OF ACTION

18. The actions of defendants Sullivan, Boyd, Van Nostrand, Jules and Gratin acting under color of federal law, and defendants Callaghan, Harkins and Greenwald, acting under color of New York law, constituted an invasion of plaintiff's right to be secure in his person, house, papers

and effects against unreasonable searches and seizures as guaranteed by the Fourth And Fourteenth Amendments to the United States Constitution, an invasion of plaintiff's right to be free from deprivation of his liberty without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, a deprivation of the plaintiff's right to the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and an invasion of plaintiff's right to privacy as guaranteed by the Ninth Amendment to the United States Constitution.

FOR A SECOND CAUSE OF ACTION

19. Plaintiff realleges the allegations in paragraphs "1" through "18" as though set forth fully herein.

20. The aforesaid actions of defendants constituted a slander and defamation of plaintiff's character and an invasion of his privacy and false arrest and abuse of process and malicious prosecution, all in violation of the law of the State of New York which this Court may adjudicate as pendant to the First Cause of Action.

WHEREFORE, plaintiff requests this Court:

(a) On the First Cause of Action: to assess compensatory damages against defendants in the amount of \$500,000, and \$250,000 in punitive damages plus costs and attorneys' fees, and to grant plaintiff a trial by jury of all issues so triable in this cause of action;

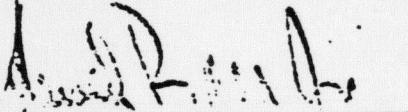
(b) On the Second Cause of Action: to assess compensatory damages against defendants in the amount of

\$500,000, and \$250,000 in punitive damages plus costs and attorneys' fees, and to grant plaintiff a trial by jury of all issues so triable in this cause of action;

(c) To grant to plaintiff such other, further and different relief as may be just.

Dated: New York, New York  
November 5, 1975

GUGGENHEIMER & UNTERMYER

By   
Attorneys for Plaintiff  
80 Pine Street  
New York, N.Y. 10005  
Tel: (212) 344-2040

LONG ISLAND PRESS, SATURDAY, NOVEMBER 17, 1973

## WAREHOUSE SUSPECT NABBED

\* \* \*

### *FBI grabs dad of 5 as gang member*

An air-cargo handler from Holbrook was charged yesterday with being one of the masked bandits who robbed a St. Albans warehouse of \$265,000 worth of Swiss watches Monday.

James F. Regan, 43, a cargo handler for Seaboard Airlines, who was picked up at work by the Federal Bureau of Investigation, was the first to be arrested in the case.

The eight bandits arrived shortly after 8 p.m. Monday at the All-Transport Warehousing and Packing Corp., 147-25 Farmers Blvd., in three trucks. They bound the 12 employes on the night crew, locked them in a security cage, and carted off 200 cases of watches and parts.

Although the robbery lasted only 37 minutes, according to Queens police, the bandits reportedly spent some time looking for another shipment of watches and settled for the one they had when the keys to the vault couldn't be found.

Regan was arraigned in Brooklyn Federal Court on charges of theft of an interstate shipment and of merchandise under a Customs bond, charges that could bring 10 years in prison and a \$10,000 fine. He was held in \$25,000 bail for a hearing Nov. 27.

Married and the father of five, he lives at 51 Normandy Drive, Holbrook.

NEWSDAY, Saturday, November 17, 1973

## *Arrest in Airport Holdup*

Brooklyn—A 43-year-old Holbrook man was charged in U.S. District Court here yesterday with federal theft counts stemming from a \$300,000 robbery Monday of a warehouse near Kennedy Airport.

James F. Regan of 51 Normandy Dr., Holbrook, has been accused of being one of six men who robbed the All Air Transport Packing and Warehousing Co. at 147-35 Farmer's Blvd. Five other suspects are being sought by the FBI.

According to court papers, six men in three trucks pulled up to the warehouse shortly after 8 PM Monday, all wearing ski masks. Their leader carried a submachine gun while several others carried handguns. They took 135 boxes of watches.

Regan appeared before Magistrate Max Schiffman and was charged with theft of interstate merchandise and theft of custom boarded merchandise. He was released on \$25,000 bond and ordered to return for a hearing Nov. 27. If convicted, Regan could be sentenced to 10 years in jail or a \$10,000 fine on each count.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK----- X  
JAMES F. REGAN. :Plaintiff, : ANSWER- against - : Civil Action  
No. 75 C 139.THE UNITED STATES OF AMERICA,  
et al.,

Defendants. :

----- X  
STATE OF NEW YORK  
COUNTY OF NEW YORK : ss.  
SOUTHERN DISTRICT OF NEW YORK)

JOSEPH F. SULLIVAN, being duly sworn, deposes and  
says:

1. I have read and am familiar with the allegations  
contained in Civil Action file number 75 C 139 in United  
States District Court for the Eastern District of New York  
in which James F. Regan alleges certain activities regard-  
ing me.

2. On November 15 and 16, 1973, I was acting as a  
Special Agent of the Federal Bureau of Investigation when  
I interviewed and subsequently arrested and transported  
James F. Regan.

3. On November 15, 1973, at about 5:45 P.M., I, and  
another Special Agent, went to locate Regan at his place  
of employment, Seaboard World Airlines, John F. Kennedy  
International Airport, Queens, New York. No other FBI  
Agents were present. New York City Police Department  
Detectives and a United States Customs Agent were present.  
Regan could not be located at Seaboard World Airlines by  
his supervisors for approximately 30 minutes. Regan was  
requested to come to the Federal Bureau of Investigation  
Office at John F. Kennedy International Airport, which  
he voluntarily did, and in fact, executed a "Voluntary  
Appearance; Advice of Rights" form at 6:21 P.M. He was

not physically seized.

4. Federal Bureau of Investigation Agents did not search his automobile or locker. Regan was not in custody, but voluntarily accompanied the Agents to the Federal Bureau of Investigation Office at John F. Kennedy International Airport. Regan was not placed under arrest until 7:28 P.M. at the FBI Office at John F. Kennedy International Airport, November 15, 1973, after receipt of authorization from Assistant United States Attorney Edward J. Boyd, Eastern District of New York, based on probable cause. After the arrest, Regan was processed at Queens Burglary Squad Headquarters at the 112th Precinct, Austin Street, Queens, New York City.

5. On November 15, 1973, Regan was brought directly from the FBI Office at John F. Kennedy International Airport to Queens Burglary, described above, for arrest processing and upon completion of processing was taken directly to Federal Detention Headquarters, West Street, New York City, for lodging pending arraignment. He was arraigned November 16, 1973, before United States Magistrate, Eastern District of New York, Brooklyn, New York. Regan was transported to Queens Burglary and Federal Detention Headquarters by me and Special Agent George Van Nostrand. No other Agents or law enforcement personnel were involved in this transportation on November 15, 1973. Once lodged at Federal Detention Headquarters, custody of Regan was transferred to the Bureau of Prisons and the United States Marshal. It is

noted that Regan was never held in custody at the Brooklyn House of Detention, as he alleges, nor was he in Brooklyn, New York, on November 15, 1973, when in FBI custody.

6. Regan was warned of his rights verbally and by use of the "Voluntary Appearance; Advice of Rights" form, which he voluntarily executed at 6:21 P.M., November 15, 1973, after stating he understood his rights and was willing to talk to Agents. He was advised of the nature of the charge against him. He was questioned during the period he was in the presence of Agents, but was in no way menaced by anyone at any time. Regan never stated any desire to terminate or discontinue the conversation. In fact, he used the opportunity to make self-serving exculpatory statements to the Agents.

7. While in custody Regan was fingerprinted and photographed. Regan was allowed to use the telephone at the Office at John F. Kennedy International Airport to make telephone calls of his own choice.

8. The allegation that I caused photographs, which were taken illegally and in violation of his rights, to be shown to various persons is untrue. I have no information that Regan's picture has been shown by anyone else. No photographs were taken illegally or in violation of his rights and all photographs taken were part of the normal arrest process. He was advised of his rights verbally and by form. Regan stated that he understood his rights and desired to waive them and talk with the Agents, having signed a form to this effect. All conversation made with me by Regan was voluntary and at no time did he indicate a desire to discontinue the conversation. Regan was

allowed to and did use the telephone in my presence and apparent communication with an attorney was effected because private counsel appeared the next morning at his arraignment. His arrest was based on probable cause and authorized by an Assistant United States Attorney. He was informed of the charges against him and he was subjected only to the proper arrest procedure. His overnight confinement and arraignment the following day was in keeping with the customary practice of the United States District Court, Eastern District of New York. An authorized complaint was filed November 16, 1973, and it is noted that the United States Magistrate, Eastern District of New York, felt that \$25,000.00 bail was warranted. Neither Regan nor private counsel made any objections at this arraignment as to any conduct by me or other law enforcement personnel as alleged in this complaint.

I have not shown any photographs of Regan from November 16, 1973 to the present time.

All action taken by me was done in the performance of my duties and were within the scope of my duties and authority under color of law. I acted in good faith at all times and had reasonable belief in the validity of my actions.

Joseph F. Sullivan  
JOSEPH F. SULLIVAN  
Special Agent  
Federal Bureau of Investigation

Sworn to before me this  
17<sup>th</sup> day of October, 1975.

Prosper K. Parkerstein  
Notary Public

Notary Public

1100 PER K. PARKE . . . N  
Hobby Room 1100 1/2 New York  
... 100-10700  
C. 1914 . . . P. 100  
... a copy of March 30, 1914

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A-18

JAMES F. REGAN

Plaintiff

-v-

THE UNITED STATES OF AMERICA,  
et al.

AFFIDAVIT

75 CIVIL 139

Defendants

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.,:  
SOUTHERN DISTRICT OF NEW YORK)

FRANCIS R. JULES, being duly sworn, deposes and says:

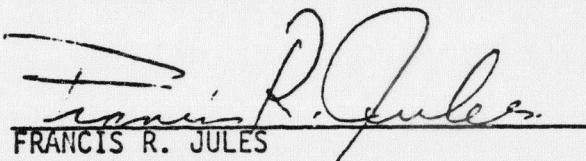
1. I have been employed as a Special Agent of the Federal Bureau of Investigation since February 19, 1951, and I am presently assigned to the John F. Kennedy International Airport Resident Agency.

2. I have reviewed Plaintiff's Complaint as filed in this case and I am familiar with the allegations contained in Plaintiff's Complaint.

3. On November 15, 1973 at about 5:45 P.M. I accompanied Special Agent Joseph F. Sullivan to locate Regan at his place of employment, Seaboard World Airlines, John F. Kennedy International Airport. Regan could not be located at Seaboard World Airlines by his supervisors for approximately thirty minutes. I and Special Agent Sullivan requested Regan to come to the FBI office at Kennedy Airport, which he voluntarily did, and he executed a Voluntary Appearance - Advice of Rights form at 6:21 P.M. I did not physically seize Regan. I did not search Regan's automobile or his locker. I and Special Agent Sullivan placed Regan under arrest at 7:28 P.M. at the Resident Agency at John F. Kennedy Airport, after receipt of authorization from Assistant United States Attorney Edward Boyd, Eastern District of New York, based on probable cause. After Regan's execution of the Advice of Rights form which he voluntarily executed at 6:21 P.M., November 15, 1973, I questioned Regan. I in no way menaced him. I never photographed Regan and I never have shown or caused any photographs of Regan to be shown to anyone else. I have no information that Regan's picture was shown to anyone else.

4. I believe my actions were done with just cause, lawfully,

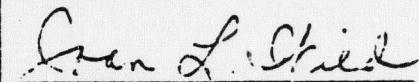
reasonably, in accordance with law, and entirely in the course of my official duties as previously described. I acted at all times in good faith and upon a reasonable belief in the validity of my actions.



FRANCIS R. JULES  
Special Agent  
Federal Bureau of Investigation

Sworn to before me this

11<sup>th</sup> day of April, 1975.

  
\_\_\_\_\_  
Notary Public

JOAN L. WILD  
Notary Public, State of New York  
No. 41-4624406  
Qualified in Queens County  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

JAMES F. REGAN

Plaintiff

-v-

THE UNITED STATES OF AMERICA,  
et al.

Defendants

X  
AFFIDAVIT

75 CIVIL 139

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.,:  
SOUTHERN DISTRICT OF NEW YORK)

GEORGE VAN NOSTRAND, being duly sworn, deposes and says:

1. I have been employed as a Special Agent of the Federal Bureau of Investigation since June 15, 1965.
2. I have read and am familiar with the allegations contained in a Complaint prepared for Plaintiff James F. Regan and dated January 23, 1975.
3. On November 15, 1973, I was employed as a Special Agent of the Federal Bureau of Investigation specifically assigned to the John F. Kennedy International Airport Resident Agency.
4. On November 15, 1973, James F. Regan, employee of Seaboard World Airlines, John F. Kennedy International Airport, appeared at the FBI Resident Agency located at Kennedy Airport in connection with the investigation of the armed robbery of All-Air Warehousing & Packaging Corporation warehouse on November 12, 1973. At approximately 7:30 P.M. on November 15, 1973, I was made aware of the fact that Regan had been placed under arrest for his participation in the above described armed robbery. Shortly thereafter, Special Agent Joseph F. Sullivan and I transported Regan directly to the Queens Robbery Squad, located within the 112th Precinct station house, New York City Police Department. This station house is located on Austin Street and Yellowstone Boulevard, Forest Hills, New York. Upon arrival at the Robbery Squad, Regan was photographed and fingerprinted in accordance with normal arrest procedures. Immediately following arrest processing, Regan was transported to the Federal House of Detention, West Street, New York City. It should be noted that the Federal House of Detention is located in Manhattan and not in Brooklyn as stated in this Complaint. Furthermore, the Brooklyn House of Detention is an institution maintained by the New York City Department of Corrections and not a federal prison. At no time was Regan

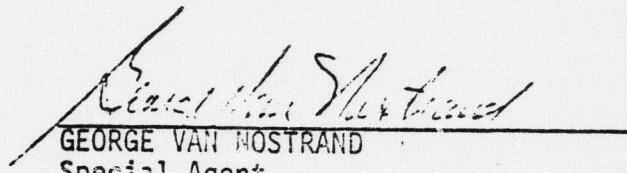
taken to or lodged in any local prison. During the transportation of Regan no effort was made to interrogate him by Special Agent Sullivan or myself.

5. Upon arrival at the Federal House of Detention, Regan was lodged for safekeeping in accordance with the normal procedures used by that institution.

6. At no time following the arrest of Regan have I shown or caused to be shown photographs of him to anyone.

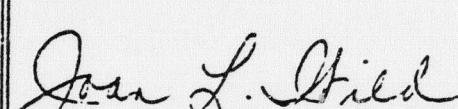
7. My conduct with respect to Regan occurred entirely in the course of my official duties as previously described.

8. My actions in this matter were proper, legal, based upon reasonable grounds, and I acted at all times in good faith and upon a reasonable belief in the validity of my actions.

  
GEORGE VAN NOSTRAND  
Special Agent  
Federal Bureau of Investigation

Sworn to before me this

11<sup>th</sup> day of April, 1975



Notary Public

JOAN L. WILD  
Notary Public State of New York  
#14604476  
Qualifies in Queens County  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A-22

JAMES F. REGAN

Plaintiff

-v-

THE UNITED STATES OF AMERICA,  
et al.

Defendants

AFFIDAVIT

75 CIVIL 139

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.,:  
SOUTHERN DISTRICT OF NEW YORK)

GUY C. BERADO, being duly sworn, deposes and says:

1. I have been a Special Agent of the Federal Bureau of Investigation since January 29, 1951.
2. I have been a Supervisor since June, 1967, and have supervised the activities of Special Agents handling Theft From Interstate Shipment matters since 1971.
3. I have reviewed the affidavits of Special Agents Joseph F. Sullivan, Francis R. Jules, and George Van Nostrand in this matter.
4. I am familiar with the investigation conducted in this matter by the above described Special Agents and affirm that all actions taken by them were within the scope of their authority and were done under color of official duty.

Guy C. Berado  
GUY C. BERADO  
Supervisor  
Federal Bureau of Investigation

Sworn to before me this

17<sup>th</sup> day of April, 1975

Joan L. Wild  
Notary Public

JOAN L. WILD  
Notary Public, State of New York  
# 41-4434405  
Qualified in Orange County  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
JAMES F. REGAN, :  
Plaintiff, : 75 Civ. 139

-against- :  
THE UNITED STATES OF AMERICA, : AFFIDAVIT  
et al., :  
Defendants. :  
-----x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

JAMES F. REGAN, duly sworn, deposes and says:  
1. I am the plaintiff in the above-captioned  
action. I make this affidavit in opposition to a motion  
by the "federal defendants," the United States of America,  
Edward Boyd, Joseph F. Sullivan, George Van Nostrand and  
Francis Jules for summary judgment. I dispute most of the  
material facts contained in the affidavits of the foregoing  
defendants.

2. On or about November 15, 1973 at approximately  
6:00 P.M., Special Agent Sullivan and several other law  
enforcement officers, including, upon information and belief,

defendants George Van Nostrand, Francis Jules, Donald Gratin, John Callaghan, James Harkins and Howard Greenwald, accosted me at my place of employment, Seaboard World Airlines, Building 260, Import Section, John F. Kennedy International Airport, Queens, New York. Only Sullivan identified himself as a Special Agent of the F.B.I. However, I believe that both Francis Jules and George Van Nostrand were also present at Seaboard World Airlines based on the facts alleged by both Jules and Van Nostrand in their affidavits.

3. Sullivan and the other officers, without displaying a warrant of any kind, or even indicating that one existed, forced me against a wall in the hallway of Seaboard World Airlines and menacingly questioned me by interrogating me about a certain crime which had allegedly been committed without identifying the time, date, place or events surrounding it. I had no idea what they were talking about, had never committed or been present at the scene of any such criminal act, and I submit they had absolutely no reason, justification nor probable cause to treat me in such a manner. At that time they threatened to put me in jail for ten to fifteen years if I did not tell them what they wanted to know, despite the fact I had no knowledge of events to which they alluded

and so advised them. When I tried to move away from the wall, one officer put his hand to my chest and physically prevented me from stepping away from the wall.

4. Then I was physically seized and escorted by some of the officers to my stationwagon which was parked in the Seaboard parking lot. One officer held my arm tightly during most of the walk to my car. When we reached the car I was ordered to turn over my keys; otherwise they threatened to open it by other means. I turned over the keys in fear of injury to my person and property. Thereupon, they searched my car, threw the contents of the glove compartment on the floor and inflicted other general damage to the car.

5. The officers, by means of similar threats, demanded they be given access to my locker at work. I reluctantly gave them the locker key in fear of injury to my person and property. Thereupon, they disappeared with my keys and, I am advised, opened my locker and searched it outside my presence. I have been advised that Ronald Gilbert, a union shop steward in the locker room, told them that such a search was not permitted, but the officers told him that their search was no concern of his and they continued their search. My locker was in total disarray when I opened it after

returning to work after my subsequent arrest.

6. At no time had the officers produced a warrant of any kind, nor have they since claimed that one ever existed. I was peacefully working at my place of employment when they seized me and my property, as set forth above. I had done nothing to warrant such treatment and had committed no crime. I submit that the defendants had no probable cause nor valid reason to treat me as they did.

7. After the events set forth above, I was accompanied to the lobby of Seaboard World Airlines and held there by my arms by two officers and then pushed into a police car. This occurred in the presence of several of my fellow workers. Upon information and belief, at or about this time, Sullivan told Raymond Bush, the assistant manager at Seaboard that I was being taken into federal custody on a charge of robbery. My arrest was also noted on my employee time card, a copy of which is attached hereto as Exhibit A, so that my arrest was made known to other employees in the Payroll Department at Seaboard. The time card indicates that my arrest took place at 6:45 P.M.

8. At no time during the interrogation by the

officers on the premises of Seaboard World Airlines nor during the subsequent automobile ride, was I advised of my constitutional rights or the charges against me nor why I had been arrested. At no time was I given an opportunity to consult with an attorney, nor was I ever told that I could consult with an attorney.

9. I was taken by car in the custody of Sullivan and another F.B.I. agent, who I believe to be Van Nostrand, to the offices of the F.B.I. at the Federal Building at J.F.K. International Airport. We were there joined by the other officers who had been present during the events described above at Seaboard World Airlines.

10. Contrary to the affidavit of Sullivan and Jules I did not go to the F.B.I. offices voluntarily. I was given no choice and I was afraid to do anything other than obey the instructions of the officers who ordered me to accompany them to the F.B.I. headquarters.

11. I did not sign any "Voluntary Appearance, advice of Rights" form or any other form either at the time stated in Sullivan's affidavit or upon my arrival at the

F.B.I. headquarters. I signed a form, however, much later, as is set forth hereinafter.

12. Upon my arrival at the F.B.I. office shortly after 6:45, I was pushed out of the car by defendants and physically pushed and shoved through a garage and along a hallway to the F.B.I. offices. There defendants Sullivan, Van Nostrand, Jules, Gratin, Callaghan, Harkins and Greenwald and certain other persons whom I cannot identify continued to interrogate me at various intervals. I was still not advised of my constitutional rights nor was I afforded an opportunity to call an attorney. During this period, one of the officers, a young fellow, threatened me by saying something like "It's going to cost you a bundle to get out of this."

13. Not until after approximately two hours of such interrogation at the offices of the F.B.I. was I finally advised of my constitutional rights. Contrary to the statement in Sullivan's affidavit, at no time was I orally advised of my constitutional rights. Instead, it was accomplished by handing me a printed form. I was then asked to sign the form, which I did.

14. Immediately thereafter, I was searched,

handcuffed and placed under arrest. Only then was I advised of the charges against me, and I was permitted to make a phone call to my brother-in-law, Chester Walters. However, Sullivan insisted on placing the call and he spoke to my brother-in-law before even allowing me to come to the phone.

15. Thereafter, Sullivan and Van Nostrand transported me to a police station in Queens County. I was there held in custody and questioned further to my continued personal distress. At one point I was required to turn to the left and to the right as if I were in a police lineup.

16. I was treated in an inhuman manner by certain of the defendants at the precinct. Despite my repeated requests, Van Nostrand refused to remove the handcuffs from my hands in order to permit me to use the bathroom facilities or to get a drink of water from a water fountain, even though I had been repeatedly searched and found to have no weapon, nor had I made any threatening gestures. While using the bathroom urinal, Van Nostrand deliberately kept the bathroom door open which subjected me to further embarrassment and humiliation. Van Nostrand also poked me bodily while I was being interrogated. At one point, I was questioned by a tall officer

with gray hair who initially loosened my handcuffs, but as soon as I did not give him the information he sought, he squeezed the handcuffs tighter, which left deep red marks on my wrists for two days. The same officer also threatened me by saying, "I got a lot of friends who owe me favors." I believed he meant that I was being framed for the crime and that the police could get certain people to lie and claim that I was involved in order to frame me even though I was in no way involved with the crime to which the police referred. Such harassment and interrogation by the defendants continued for more than five hours from the time I was originally taken into custody.

17. I was then transported to the federal detention headquarters, West Street, New York City, by Sullivan and Van Nostrand and held in custody there for the duration of the night. After my arrival I requested permission to use the bathroom facilities, but I was not permitted to go to the bathroom until an hour later. I was also subjected to a "strip search" and was required to bend over to touch my toes while naked. My clothing was taken from me and I was required to wear jail house clothing. I was also finger-printed and photographed, all to my great personal distress

and humiliation.

18. On the following morning, November 16, 1973, I was handcuffed to another prisoner, forced to sit in a police van which was guarded by a guard armed with what looked like a pump action shotgun, and was transported to the Federal Court. I was forced to walk in public while handcuffed and heavily guarded. Upon arrival at the Federal Court building, I was again fingerprinted and photographed to my continued personal distress.

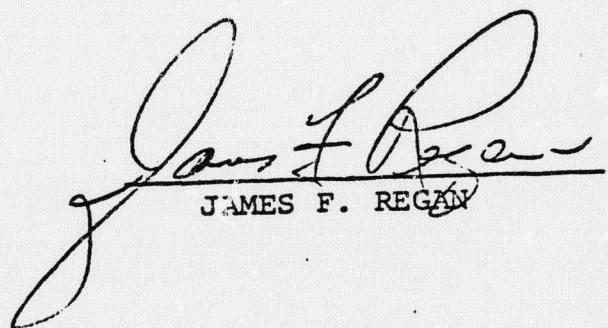
19. I was then arraigned before a United States Magistrate in the United States District Court in the Eastern District of New York on a criminal complaint authorized by defendant Boyd, charging me with willful and unlawful participation in an armed robbery in which merchandise moving in foreign commerce, having a value of more than \$100, was stolen in violation of the laws of the United States. These charges were completely false. This criminal complaint was dismissed against me on November 27, 1973 upon motion of the United States Attorney.

20. On November 17, 1973 the defendants caused newspaper articles to appear in the Long Island Press and Newsday, stating in substance that I had been arrested and

charged with robbery of a warehouse near Kennedy Airport. These articles caused me great personal distress and business damage. These statements constituted libel and defamation of character which I am advised by counsel was alleged with particularity by attaching copies of the aforementioned articles to the Amended Complaint.

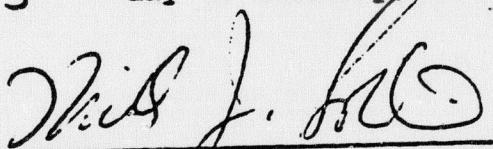
21. On various dates subsequent to November 27, 1973, certain of the defendants caused photographs of me, taken illegally and in violation of my rights, to be shown to various persons, including Tom Aroksaar, one of my supervisors at Seaboard World Airlines. This caused me great personal distress.

22. As a result of the foregoing events, I have suffered and continue to suffer great humiliation, embarrassment and physical and mental suffering as well as loss of reputation in and amongst my business associates, friends and family.



JAMES F. REGAN

Sworn to before me this  
5<sup>th</sup> day of January 1976.



Notary Public  
State of New York  
No. 31-460573  
Valid in New York County  
Expiration March 30, 1977

1  
 EMPLOYEE NUMBER 1381  
 JOB NUMBER 88426  
 BASIC RATE 5.48  
 A-33  
 PAY DATE  
 EMPLOYEE NAME J. REGAN  
 PAY PERIOD 025  
 DATE 11/18/1973

MEALS	LATE LUNCH		OTHER REG.		OTHER O.T.	
	CODE	NO.	CODE	AMOUNT	CODE	AMOUNT
2	C	3				

	MON.	TUE.	WED.	THURS.	FRI.	SAT.	SUN.	SHIFT
HOURS WORKED	120	120	80	27				3
REG.	80	80	80	27				
1.5	40	40						
2.0								
2.5								
UNDER					53			
OTHER HOURS								

16	24.0	0						OTHER SHIFT
15								
14								
13	5	3						
12	5	3		20.0				
11	5	3						
10	13	24.0						
9	215.6	215.6	315.5	0.0				
8				18.15				
7					0.0	0.0	0.0	FRINGE HOURS
6								
5					212.4			
4								
3								
2								
1								
	MON.	TUES.	WED.	THUR.	FRI.	SAT.	SUN.	

BEST COPY AVAILABLE

EXHIBIT A

REASON	RATE	REGULAR		OVERTIME	
		HOURS	AMOUNT	HOURS	AMOUNT
LATE LUNCH	40	8.0	32.0	1.5	45 2.70
MON.				2.0	
				2.5	
TUE.				1.5	
				2.0	
				2.5	
WED.				1.5	
				2.0	
				2.5	
THU.				1.5	
				2.0	
				2.5	
FRI.				1.5	
				2.0	
				2.5	
SAT.				1.5	
				2.0	
				2.5	
SUN.				1.5	
				2.0	
				2.5	
TOTAL					

Employee taken off premises  
at 1845 by F.B.I (LB) 11/15

11/15 31.30" at straight-time rate  
driven road test

Brandenburg

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

JAMES F. REGAN,

Plaintiff, : 75 Civ. 139

-against-

AFFIDAVITTHE UNITED STATES OF AMERICA,  
et al.,

Defendants.

:

-----X

STATE OF NEW YORK )  
: ss.:  
COUNTY OF QUEENS )

T. E. AROKSAAR, being duly sworn, deposes and  
says:

1. I am a supervisor of cargo services at Seaboard  
World Airlines, John F. Kennedy International Airport, New  
York, New York. James F. Regan, plaintiff in the above-  
captioned case, has been an employee in my section at Seaboard  
at least since July 30, 1973, when I began work there.

2. At some time during the summer or fall, 1974,  
I was asked to meet with Mr. Jerry O'Neil and Donald Gratin,  
of the U.S. Customs Service in order to view certain photo-  
graphs for the purpose of making an eye-witness identification

in a matter in no way connected with the above-captioned case.

3. Either one of the agents mentioned above showed me a looseleaf book of approximately seventy-five to one hundred photographs which contained a color snapshot of James F. Regan. This photograph stood out since it was one of approximately one-half dozen color photographs in the book of mostly black and white photographs.

4. Had I not known of James Regan's prior arrest, I would have been surprised to see his photograph in the Rogues' Gallery shown to me by the U.S. Customs Agent.

5. Within the next few days, I saw James Regan at Seaboard World Airlines and told him I saw his photograph in a Rogues' Gallery shown to me by a law enforcement officer.

T. E. Aroksaar  
T. E. AROKSAAR

Sworn to before me this

day of  
Paul A. Riis  
Notary Public

PAUL A. RIIS  
Notary Public  
State of New York  
County of Bronx  
March 20, 1947

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X  
JAMES F. REGAN,  
Plaintiff,  
- against -  
AMENDED  
ANSWER TO  
AMENDED COMPLAINT

THE UNITED STATES OF AMERICA; EDWARD BOYD, individually and as Assistant United States Attorney for the Eastern District of New York; JOSEPH F. SULLIVAN, individually and as a Special Agent of the Federal Bureau of Investigation; GEORGE VAN NOSTRAND, individually and as a Special Agent of the Federal Bureau of Investigation; FRANCIS R. JULES, individually and as a Special Agent of the Federal Bureau of Investigation; DONALD GRATIN, individually and as a United States Customs Agent, United States Customs Service; JOHN F. CALLAGHAN, individually and as a member of the New York City Police Department; JAMES M. HARKINS, individually and as a member of the New York City Police Department; and HOWARD GREENWALD, individually and as a member of the New York City Police Department,

Civil Action  
No. 75 C 139

Defendants.

----- X

Defendants, JOSEPH F. SULLIVAN, GEORGE VAN NOSTRAND, FRANCIS R. JULES and DONALD J. GRATAN, by their attorney, DAVID G. TRAGER, United States Attorney for the Eastern District of New York. PROSPER K. PARKERTON, Assistant United States Attorney, of counsel, in answering the plaintiff's amended complaint, allege:

FIRST: The allegations contained in paragraph "1" of the complaint herein present questions of law which are respectfully referred to the Court.

SECOND: Admit the allegations contained in paragraph "14" of the complaint herein.

THIRD: Deny the allegations contained in paragraphs "9", "15", "16", "17", "18", and "20" of the complaint herein.

FOURTH: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "2", "5" and "13" of the complaint herein.

FIFTH: Deny the allegations contained in paragraph "3" of the complaint herein except admit that Edward Boyd was at all material times an Assistant United States Attorney for the Eastern District of New York, that his business address was 225 Cadman Plaza East, United States Courthouse, Brooklyn, New York, and that he was responsible for some complaints filed and warrants issued to federal law enforcement officers in the Eastern District of New York.

SIXTH: Deny the allegations contained in paragraph "4" of the complaint herein except admit that JOSEPH F. SULLIVAN, GEORGE VAN NOSTRAND and FRANCIS R. JULES, were at all material times and are Special Agents of the Federal Bureau of Investigation, that they are assigned to the John F. Kennedy International Airport Residency Agency, County of Queens, State of New York, and that they are sued individually.

SEVENTH: Deny the allegations contained in paragraph "6" of the complaint herein except admit that DONALD J. GRATTAN, was at all material times and is a United States Customs Agent of the United States Customs Service, that he is assigned to the John F. Kennedy International Airport, County of Queens, State of New York, and that he is sued individually.

EIGHTH: Deny the allegations contained in paragraph "7" of the complaint except admit that on or about November 15, 1973, at about 5:45 p.m. Special Agents Sullivan and Jules went to plaintiff's place of employment at J.F.K. International Airport, subsequently arrested plaintiff based upon probable cause and that no arrest or search warrant was issued prior to the plaintiff's arrest.

NINTH: Deny the allegations contained in paragraph "8" of the complaint herein except admit that on or about November 15, 1973, and November 16, 1973, and after plaintiff's probable cause arrest, he was brought from the F.B.I. Office at John F. Kennedy International Airport by Special Agents Sullivan and Van Nostrand to the Queens Burglary Squad Headquarters at the 112th Precinct, Austin Street, Queens, New York, for routine post-arrest processing, that he was thereafter taken to the Federal House of Detention, West Street, New York, New York, and that while in the custody of the United States Marshals Service he was taken to the United States Courthouse for the Eastern District of New York for arraignment before a United States Magistrate.

TENTH: Deny the allegations contained in paragraph "10" of the complaint herein except admit that, subsequent to being given appropriate warnings, plaintiff was interrogated, photographed and fingerprinted in the absence of counsel.

ELEVENTH: Deny the allegations contained in paragraph "11" of the complaint herein except admit that the filing of a complaint against the plaintiff for theft from interstate shipment in violation of Title 18, United States Code, Section 659, was authorized by the office of the United States Attorney for the Eastern District of New York.

TWELFTH: Deny the allegations contained in paragraph "12" of the complaint except admit that plaintiff was arraigned before a United States Magistrate in the Eastern District of New York on the criminal complaint referred to in paragraph "eleventh" of this answer and thereafter held in custody until the appropriate bail bond was raised and posted.

A-40

THIRTEENTH: In reply to paragraph "19" of the complaint herein, repeat and reallege each and every admission or denial, with any exception thereto, set forth in this answer to each preceding paragraph of the complaint herein.

AS AND FOR A FIRST SEPARATE AND  
COMPLETE AFFIRMATIVE DEFENSE

FOURTEENTH: Defendants Joseph F. Sullivan, George Van Nostrand, Francis R. Jules and Donald J. Grattan were, at all times material to the allegations contained in the complaint herein, acting within the outer perimeter of their authority as agents of the UNITED STATES OF AMERICA, in good faith and with reasonable grounds for their belief in the legality of their actions.

AS AND FOR A SECOND SEPARATE AND  
COMPLETE AFFIRMATIVE DEFENSE

FIFTEENTH: The claims alleged in the complaint herein against defendants Joseph F. Sullivan, George Van Nostrand, Francis R. Jules and Donald J. Grattan are barred by the applicable statute of limitations.

WHEREFORE, defendants Joseph F. Sullivan, George Van Nostrand, Francis R. Jules and Donald J. Grattan respectfully demand judgment dismissing the complaint herein and granting judgment to said defendants, together with the costs and disbursements of this action, along with such other and further relief as the Court deems just and proper under the circumstances.

Dated: Brooklyn, New York  
May 21, 1976

DAVID G. TRAGER  
United States Attorney  
Eastern District of New York  
Attorney for Defendants,  
Sullivan, Van Nostrand, Jules  
and Grattan  
225 Cadman Plaza East  
Brooklyn, New York 11201

By:

*Prosper K. Parkerton*  
PROSPER K. PARKERTON  
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

JAMES F. REGAN,

FILED  
IN CLERK'S OFFICE  
U. S. DISTRICT COURT E.D. N.Y.

Plaintiff, : 

APR 30 1976 

-against-

TIME A.M. ....

THE UNITED STATES OF AMERICA; :  
EDWARD BOYD, individually and as :  
Assistant United States Attorney :  
for the Eastern District of New :  
York; JOSEPH F. SULLIVAN, indi- :  
vidually and as a Special Agent of :  
the Federal Bureau of Investigation; :  
GEORGE VAN NOSTRAND, individually :  
and as a Special Agent of the Fed- :  
eral Bureau of Investigation; :  
FRANCIS R. JULES, individually and :  
as a Special Agent of the Federal :  
Bureau of Investigation; DONALD :  
GRATIN, individually and as a :  
United States Customs Agent, United :  
States Customs Service; JOHN F. :  
CALLAGHAN, individually and as a :  
member of the New York City Police :  
Department; JAMES M. HARKINS, indi- :  
vidually and as a member of the New :  
York City Police Department; and :  
HOWARD GREENWALD, individually and :  
as a member of the New York City :  
Police Department,

M'FILED

M'FILED

MEMORANDUM  
AND  
ORDER

Defendants.

## APPEARANCES:

GUGGENHEIMER & UTERMAYER  
Attorneys for Plaintiff  
By JOAN ROSS SORKIN, ESQ.

DAVID G. TRAGER, ESQ.  
United States Attorney,  
Eastern District of New York  
Attorney for Federal Defendants  
By PROSPER K. PARKERTON, ESQ.  
Assistant U. S. Attorney

NEAHFR, District Judge.

Plaintiff James Regan brought this civil action for money damages alleging violations of his constitutional and civil rights and the commission of certain common law torts by defendants. Plaintiff's federal claims against the federal defendants are founded directly upon the United States Constitution, specifically the fourth, fifth, sixth and ninth amendments. Those against defendant New York City police officers are brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983. Jurisdiction is based on 28 U.S.C. §§1331, 1343(3). With respect to the State law cause of action, the court is asked to exercise pendent jurisdiction.

Plaintiff is now, and was at the time of the occurrence, employed as a cargo handler at John F. Kennedy

International Airport in Queens County, New York. The controversy stems from plaintiff's arrest at the airport by FBI agents, allegedly in bad faith and without probable cause, an allegedly illegal search, an involuntary interrogation without Miranda warnings, an illegal confinement, the denial of the right to counsel and acts of harassment and abuse by federal and State officers. Plaintiff was arrested the evening of November 15, 1973, arraigned before a United States Magistrate November 16, 1973, and released on \$25,000 bond. A complaint was filed charging him with armed robbery in which merchandise moving in foreign commerce with a value of more than \$100 was stolen. On November 17, 1973 newspaper articles appeared "stating that plaintiff had been arrested and charged with robbing a warehouse near Kennedy Airport" (Complaint, ¶13). However, upon motion of the United States Attorney, the complaint was dismissed on or about November 27, 1973.

The complaint originally named as defendants the United States, Edward Boyd, an Assistant United States Attorney, Joseph Sullivan, John Doe Nos. 1 and 2, all special agents of the FBI, and Richard Roe Nos. 1 and 2, New York City police officers. Through interrogatories plaintiff ascertained the

identities of the fictitious parties and, with leave of court, filed an amended complaint substituting George Nostrand and Francis Jules, special agents of the FBI, and John Callaghan and James Harkins, New York City police officers, for the Does and Roes respectively. The amended complaint added two new party defendants, Donald Gratin, a member of the United States Customs Service, and Harold Greenwald, another City police officer. The individual defendants were sued in both their official and individual capacities.

The federal defendants now move for summary judgment dismissing the complaint against them. Rule 56, F.R.Civ.P. The motion is granted in part and denied in part for the reasons which follow.

United States

Defendant United States asserts that the action is barred by the doctrine of sovereign immunity. The court agrees.

The United States, as sovereign, is immune from suit unless specific statutory consent to be sued has been

given. United States v. Sherwood, 312 U.S. 584, 586 (1941). The parties have contested whether such statutory consent to suit may be found in the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671, et seq. Under this Act, the United States has consented to be sued in tort upon certain claims arising from the acts or omissions of its employees acting within the scope of employment, in accordance with State law. See 28 U.S.C. §1346(b). This consent, however, is not without limitation. A specific exception to suit under the Act precludes "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. §2680(h).<sup>1</sup>

Defendants maintain the allegedly wrongful acts which form the basis for plaintiff's federal claim are no more than the torts excepted from the statute, and thus are barred.

Plaintiff, in opposing the motion, argues that the thrust of his claim against the United States is not that defendant officers committed the torts named, but rather that they acted in "deprivation of plaintiff's constitutional

rights" arising out of the fourth, fifth, sixth and ninth amendments. It is plaintiff's position that the exception of §2680(h), supra, is inapposite as nowhere is the deprivation of constitutional rights discussed in that section, and therefore suit is not barred.

Although plaintiff's characterization of the distinctive nature of his federal cause of action is correct, see Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Monroe v. Pape, 365 U.S. 167, 195 (1961) (Harlan, J., concurring), plaintiff's novel construction of the Federal Tort Claims Act misconceives that Act's operation. The government has consented to suits by individuals asserting claims for

"personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b).

No action for deprivation of constitutional rights, however, would lie against the United States if it were a "private person," nor by plaintiff's own description does his

federal cause of action arise under "State law." Cf.

Richards v. United States, 369 U.S. 1 (1962). Moreover, it was the purpose of the 1974 amendments to the Act, see supra note 1, not applicable here, to make the government independently liable, as a counterpart to Bivens, for certain intentional torts of its investigative and law enforcement officers. U.S. Code Cong. & Admin. News 2789-91 (1974).

A second possible source of consent might seem to be the Tucker Act, 28 U.S.C. §1346(a), which gives jurisdiction to the district courts, concurrent with the Court of Claims, of:

"Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. §1346(a)(2).

The short answer is that the United States has not consented to such suit. Duarte v. United States, \_\_\_ F.2d \_\_\_ (2 Cir. 1976) (Slip Op. p. 2807). In order to recover against the United States the "grant of a right of action must be made with specificity" such that the basis of the

federal claim "in itself" mandates compensation by the government. United States v. Testan, \_\_\_ U.S. \_\_\_, 44 U.S.L.W. 4245, 4248 (March 2, 1976). The basis of plaintiff's claim here, the Constitution, does not itself specifically afford the right to compensation from the government. See generally Duarte v. United States, supra.

As stated by Justice Harlan concurring in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra,

"However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." 403 U.S. at 410.

Sovereign immunity not having been waived with respect to the causes of action against the United States that part of the complaint must be dismissed. Plaintiff's cross-motion that the government's answer be deemed a denial of plaintiff's administrative claims, a prerequisite to suit under the Federal Tort Claims Act, 28 U.S.C. §2675, is likewise denied.

Federal Defendants in their Official Capacities

The second aspect of defendants' motion for summary judgment seeks dismissal of the complaint against the individual federal defendants insofar as they are sued in their official capacities. Defendants argue that any recovery of money damages against a federal officer sued in his official capacity would be expended upon the public treasury and thus from the sovereign itself. This result is barred by the doctrine of sovereign immunity, defendants conclude, relying on Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949).

Plaintiff in opposition maintains an exception to Larson's general rule that a suit against an officer is one against the sovereign, which is also stated in Larson, applies. The Supreme Court there stated:

"[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief. It is important to note

that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power." Id. at 689-90.

Plaintiff argues that defendant officers' powers are limited by statute, i.e., the Constitution, that they acted as officers beyond the limitations set in the Constitution, and therefore, that they may be sued for injuries inflicted while acting in their official capacities. Any possibility of indemnity from the United States, plaintiff argues, is premature.

The contradiction apparent is the following: defendants are (1) federal officers, (2) whose actions, however wrongful, were within the "scope of their authority," see Monroe v. Pape, supra, (3) who may be sued for deprivation of constitutional rights, see Bivens, supra, but (4) it is claimed, can only be sued as individuals, not in their official capacities.

Larson, while prescribing circumstances in which a suit against an officer is not one against the sovereign, 337 U.S. at 689-90, does not speak in terms of the possible "capacities" in which a federal officer may be sued. It does

make clear this much, "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." Id. at 687. The named defendants here are in no sense "nominal" parties.

An action founded upon the Constitution for deprivation of constitutional rights, like one arising under the Civil Rights Act, 42 U.S.C. §1983, is essentially based on the infliction of a wrong by an official under color of authority. Defendants are personally liable and any judgment must run against them individually. See Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974); Sostre v. McGinnis, 442 F.2d 178, 205 (2 Cir. 1971).

What the Supreme Court stated in Scheuer, an action under 42 U.S.C. §1983, is directly on point. The district court had dismissed the complaints on the ground, inter alia, that defendants were being sued "in their official and representative capacities and that the actions were therefore in effect against the State." Id. at 236. The Supreme Court reversed, holding that the complaints alleged facts demonstrating their intent "to impose individual and personal liability on the named defendants." Id.

at 238. The Court distinguished between suits brought against an individual in name but against the State in fact which are barred by the eleventh amendment, Edelman v. Jordan, 415 U.S. 651 (1974), and suits confronting a State official with the claim that he had deprived another of a federal right under color of State law, not barred by the eleventh amendment, stating

"Ex parte Young [209 U.S. 123 (1908)] teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he

"comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." (Emphasis in original.) 416 U.S. at 237.

While holding that plaintiffs had stated a cause of action the Court in Scheuer made express the individual and personal nature of defendants' liability.

In the present case defendants are sued both in their individual and official capacities. For the same reasons that damage awards in actions under 42 U.S.C. §1983 must be framed to run against defendants only in their

individual capacities, Thonen v. Jenkins, 517 F.2d 3, 6 (4 Cir. 1975); Sostre v. McGinnis, supra, and that defendants may be sued only individually, Condosta v. Vermont Electric Cooperative, Inc., 400 F. Supp. 358, 361 (D. Ct. 1975), federal defendants' motion for summary judgment dismissing the claims brought against them in their official capacities, in this action for damages founded upon the Constitution, is granted.

Edward Boyd

Defendant Boyd at time of plaintiff's arrest was Chief of the Criminal Division of the United States Attorney's Office for the Eastern District of New York. Plaintiff alleges and defendants' affidavits concur that Boyd authorized plaintiff's arrest by the named Special Agents of the FBI. Boyd avers, however, that although he had supervisory authority over the cases in the Criminal Division he "did not personally conduct" Regan's case and has "no present recollection" of Regan's arrest or of the acts complained of. His affidavit further recites:

"My duties at that time included authorizing the arrest of persons whom agents of the Federal Bureau of Investigation and other

agencies of the Federal Government had reasonable grounds to believe had committed felonies, in violation of the laws of the United States."<sup>2</sup>

As ground for the grant of summary judgment defendant urges that he was clothed with official immunity, insulating him from liability premised on the performance of one of his discretionary functions as Chief of the Criminal Division, citing Barr v. Matteo, 360 U.S. 564 (1959).

Plaintiff, opposing, argues that any immunity which Boyd may possess is qualified, that is, his immunity depends upon the circumstances at the time of his action and the reasonableness of the grounds for his good faith belief. Scheuer v. Rhodes, supra, 416 U.S. at 238-39. Plaintiff maintains that whether Boyd acted in good faith and with probable cause are material facts in genuine dispute which can only be decided at trial. He strenuously urges that if Boyd authorized the arrest with no knowledge of the factual basis for the FBI agents' belief of probable cause, serious questions regarding the reasonable exercise of his authority arise and thus summary judgment at this time would be premature.

The sole act upon which plaintiff seeks to pin

liability is Boyd's authorization of plaintiff's arrest..

Boyd, it appears, took no part in the investigation preceding the telephone call from the FBI agents requesting his authorization. Nor, is it argued, would the agents be bound to follow his advice. In these circumstances, in which Boyd acted within his official responsibility as Chief of the Criminal Division, the court concludes that he is immune from suit.

An individual is clothed with official immunity where he has acted "within the scope of his authority" and has shown he performs "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." Barr v. Matteo, supra, 360 U.S. at 575. As plaintiff argues, for officers of the executive branch of government, a qualified immunity "in varying scope" is available, dependent upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared." Scheuer v. Rhodes, supra, 416 U.S. at 247. But the Supreme Court has recently enunciated the standard which the court believes controlling here. Specifically, a prosecutor is absolutely immune from suit in actions based on an act within the scope

of the prosecutorial function. Imbler v. Pachtman, \_\_\_\_ U.S. \_\_\_\_ (1976), 96 S.Ct. 984; 990. See also Fine v. City of New York, \_\_\_\_ F.2d \_\_\_\_ (2 Cir. 1976) (Slip Op. 1413, 1419); Fanale v. Sheehy, 385 F.2d 866 (2 Cir. 1967); Gregoire v. Biddle, 177 F.2d 579 (2 Cir. 1949); Yaselli v. Goff, 12 F.2d 826 (2 Cir. 1926). Defendant Boyd has met that test. The motion for summary judgment dismissing the complaint against Boyd is granted.

Federal Agents in their Individual Capacities

Defendants finally seek summary judgment on the ground that material facts not in dispute establish their good faith belief in the validity of their acts and probable cause for plaintiff's arrest. Plaintiff, while recognizing the existence of a defense based on an officer's good faith and reasonable belief, strongly opposes the motion pointing out the existence of myriad facts relating to the events in dispute.

It is undisputed that plaintiff has stated a good cause of action against the federal agents in their individual capacities based on Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Defendants here assert no claim of immunity. See Bivens, 456 F.2d 1339, 1347 (2 Cir, 1972) (on remand). Whether each agent can

"prove, not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable," id. at 1348,

can only be decided at trial. The court agrees with plaintiff that summary judgment would be inappropriate. See Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317 (2 Cir. 1975); Jaroslawicz v. Seedman, 528 F.2d 727 (2 Cir. 1975).

Accordingly, defendants' motion for summary judgment dismissing the complaint in favor of defendants United States and Edward J. Boyd is granted. The complaint is also dismissed as against defendants Joseph F. Sullivan, George Van Nostrand, Francis R. Jules and Donald Gratin sued in their official capacities, but their motion is denied insofar as they are sued as individuals.

SO ORDERED.

Edward R. Kleber

U. S. D. J.

Dated: Brooklyn, New York  
April 30, 1976

## FOOTNOTES

<sup>1</sup> Plaintiff's claim antedates the 1974 amendments to the Federal Tort Claims Act which would give the requisite consent by the United States to such a claim. That section now provides:

"That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. §2680(h).

<sup>2</sup> Affidavit of Edward J. Boyd, October 28, 1975, filed January 5, 1976, ¶2.

<sup>3</sup> Contrast Jaroslawicz v. Seedman, 528 F.2d 727 (2 Cir. 1975), in which defendant Chief of Detectives, who had actively participated in the investigation and arrest of plaintiff, was held subject to suit.

CIS:PKP:ec  
F. #UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK----- X  
JAMES P. REGAN,

Plaintiff,

- against -

JOSEPH F. SULLIVAN, GEORGE VAN  
NOSTRAND, FRANCIS R. JULES,  
DONALD J. GRATTAN, JOHN F.  
CALLAGHAN, individually and as  
a member of the New York City  
Police Department; JAMES M. HARKINS,  
individually and as a member of  
the New York City Police Depart-  
ment; and HOWARD GREENWALD, in-  
dividually and as a member of the  
New York City Police Department,

NOTICE OF MOTION  
FOR JUDGMENT ON  
THE PLEADINGSCivil Action  
No. 75 C 139

Defendants.

----- X  
PLEASE TAKE NOTICE that the undersigned will move  
before the Honorable Edward R. Neaher, at the United States  
Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on  
the 9<sup>th</sup> day of July, 1976, at 10:00 a.m., or as soon there-  
after as counsel can be heard, for an order pursuant to  
Rule 12(c) of the Federal Rules of Civil Procedure granting  
judgment on the pleadings in favor of the defendants Joseph  
F. Sullivan, George Van Nostrand, Francis R. Jules and  
Donald J. Grattan, on the grounds that the action as to  
them is barred by the applicable statute of limitations,  
and dismissing the complaint as to said defendants, along  
with such other and further relief as the court deems just  
and proper under the circumstances.

Dated: Brooklyn, New York  
June , 1976

DAVID G. TRAGER  
United States Attorney  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

By:

*Joseph K. Parker*  
JOSEPH K. PARKER  
Assistant U. S. Attorney

TO: -

Guggenheimer & Untermyer  
80 Pine Street  
New York, New York 10005

W. Bernard Richland  
Corporation Counsel  
Municipal Building  
New York, New York 10007

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK-----x  
JAMES F. REGAN,

Plaintiff,

-against-

JOSEPH F. SULLIVAN, GEORGE VAN  
NOSTRAND, FRANCIS R. JULES,  
DONALD J. GRATTAN, JOHN F.  
CALLAGHAN, individually and as  
a member of the New York City  
Police Department; JAMES N. HARKINS,  
individually and as a member of  
the New York City Police Depart-  
ment; and HOWARD GREENWALD, in-  
dividually and as a member of the  
New York City Police Department,

75 C 139

: MEMORANDUM AND  
: ORDER

Defendants.

-----x  
APPEARANCES:

GUGGENHEIMER & UNTERMEYER, ESQS.  
Attorneys for Plaintiff  
By DAVID M. BRODSKY, ESQ.  
JOAN ROSS SORKIN, ESQ.

DAVID G. TRAGER, ESQ.  
United States Attorney  
Eastern District of New York  
Attorney for Defendants Sullivan,  
Van Nostrand, Jules & Grattan  
By PROSPER K. PARKERTON, ESQ.  
Assistant U.S. Attorney

NEAHER, District Judge

This is a civil action for money damages for alleged  
violations of plaintiff's constitutional and civil rights by  
federal agents and New York City police officers stemming

from his arrest and detention on November 15-16, 1973. Plaintiff's cause of action against the federal defendants is founded directly upon the Constitution as defined in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); against the police officers under the Civil Rights Act of 1871, 42 U.S.C. §1983, and against all defendants on a claim of conspiracy under 42 U.S.C. §1985. The court is also asked to exercise pendent jurisdiction over the following claims under New York law: slander, defamation of character, invasion of privacy, false arrest, abuse of process and malicious prosecution.

The federal defendants now move for judgment of dismissal on the pleadings, Rule 12(c), F.R.Civ.P. Their motion is granted.

## I

Defendants first move for judgment on the constitutional claim on the ground that plaintiff's action is barred by the statute of limitations. Their motion squarely raises the question of what statute of limitations applies to a Bivens type action, an issue upon which authority is surprisingly scarce.

Plaintiff's claim arises out of acts of federal investigative officers on November 15-16, 1973, and arguably up to dismissal of the criminal complaint November 27, 1973. The complaint in this action was filed, tolling the statute, on

January 29, 1975.

Defendants argue that the court should look to New York law to determine the applicable period, that New York's one-year statute, CPLR §215, is the most appropriate, and therefore that the action is time-barred.

Plaintiff strongly opposes, arguing, first, that the court should fashion a purely federal limitations period of two years based on the Federal Tort Claims Act procedure, 28 U.S.C. §2401(b); secondly, that New York's three-year period applied to actions under 42 U.S.C. §1983 is most appropriate; or thirdly, that the general limitations provisions, six years under CPLR §213, should apply, making the action timely.

Courts have not infrequently been confronted with the problem of defining the most appropriate statute of limitations for federal causes of action, based on federal statutory law. It goes without saying that, for the present cause of action, implied from the Constitution itself, no explicit statute of limitations has been prescribed.

Where Congress has provided no specific limitations period for a federally created cause of action the court will generally look to state law for the federal rule of decision.

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)

(42 U.S.C. §1981); UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (Labor Management Relations Act); Cope v. Anderson, 331 U.S. 461 (1947) (National Bank Act); Campbell v. City of Haverhill,

155 U.S. 610 (1895) (Patent Act); Swan v. Board of Higher

Education of the City of New York, 319 F.2d 56, 60 (2 Cir. 1963) (42 U.S.C. §1983). Only when uniformity is particularly necessary or when the nature of the federal right demands a particular statute of limitations will the court create a special federal limitations period. McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (unseaworthiness claim joined with Jones Act action); Holmberg v. Armbrecht, 327 U.S. 392 (1946) (federal rule on fraudulent concealment). See Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971).

Plaintiff has urged the adoption of a purely federal statute of limitations on grounds of uniformity. But it must still be asked what sort of uniformity is desired or thereby effected: nationwide uniformity among federal courts for all Bivens actions; uniformity as between treatment of this right and of its analogue, the Civil Rights Act; or uniformity as between treatment of this federal right and of State rights of a related conceptual character. Cf. Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 85 (2 Cir. 1961).

What kind of uniformity will result based on the suggested statutes? Plaintiff first suggests reference to the Federal Tort Claims Act since, by reason of the recent 1974 amendments, claims arising out of acts of assault, battery, false arrest, malicious prosecution and the like by federal investigative or law enforcement officers may now be maintained against the United States. In plaintiff's view,

where the facts underlying plaintiff's Bivens claim against the federal agents might also be in the subject of a tort claim against the United States, the statute of limitations should be the same for both actions.

Plaintiff's argument that a federally created cause of action, implied from rights guaranteed in the U.S. Constitution against individuals who are federal officers acting under color of authority, should be controlled by a uniquely federal statute of limitations is an appealing one. However, it encounters an insuperable practical obstacle--no uniformity would in fact result. Not only do the elements of a Bivens claim and an intentional tort differ, but the two-year period of 28 U.S.C. §2401(b) refers not to the time for commencement of an action, but for filing the requisite administrative claim. No other federal analogue has been presented. In the absence of any analogous federal statute to which the court may turn for guidance and which would produce the uniformity desired, the court is not free to indulge in such judicial legislation as the ex parte creation of a limitations period would require.

As an alternative, plaintiff argues that, inasmuch as a Bivens action is the counterpart, for federal officers, of the Civil Rights Act, 42 U.S.C. §1983, the same statute of limitations should apply to both actions to prevent the incongruity of different results under different phases of federal

law, citing Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2 Cir. 1972) (on remand from the Supreme Court on the question of immunity). However, such a solution would not effectuate a nation-wide uniformity but logically would create only a State by State uniformity for two similar federal causes of action.

The court must reject the argument that a purely federal period should be created, and therefore turns to New York law as the most appropriate source to determine the applicable limitations period for a Bivens action. Cf. Fine v. City of New York, 529 F.2d 70, 76 (2 Cir. 1975) (action against City of New York founded directly upon fourteenth amendment governed by N.Y. Gen. Mun. L. §50-i).

Plaintiff's proposal to incorporate here the statute of limitations governing a §1983 action rests also on the notion of directly applying New York law. The statute of limitations generally applied in actions under 42 U.S.C. §1983 is CPLR §214(2), that is, "an action to recover upon a liability . . . created or imposed by statute." Swan v. Board of Education, supra; Romer v. Leary, 425 F.2d 186 (2 Cir. 1970); Ortiz v. LaVallee, 442 F.2d 912 (2 Cir. 1971); Kaiser v. Cahn, 510 F.2d 282 (2 Cir. 1974).

Plaintiff argues that precedent in this district establishes the three-year period under CPLR §214(2) as controlling in Bivens actions also. See Ervin v. Lanier, 404

F. Supp. 15 (E.D.N.Y. 1975). The defendants correctly point out, however, that the statement in Ervin is dictum, inasmuch as that suit would in all events have been barred.

The rote application of CPLR §214(2) to Bivens actions cannot withstand analysis. A Bivens action, founded as it is upon the Constitution, is not, except in the most expansive sense, "created or imposed by statute." Unless a cause of action itself is founded upon a statute, CPLR §214(2) cannot apply. New York v. Cortelle Corp., 38 N.Y. 2d 83, 378 N.Y.S. 2d 654 (1975).

Which then is the most appropriate period? The federal defendants most strongly urge adoption of CPLR §215(3) which provides for a one-year period for actions:

... to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law."

Both cases cited by defendants rely on the analogue of the state intentional tort. See Felder v. Daley, 403 F. Supp. 1324 (S.D.N.Y. 1975); Dailey v. Banks, Civil Action No. A-74-42 (W.D.N.C. October 4, 1974).

The court rejects, as does plaintiff, the notion that a Bivens action can be equated with State law intentional torts. The elements of the two claims, as federal defendants were quick to point out with regard to the Federal Tort Claims

Act analogy, and the conceptual character of the rights are distinctly different.

As the Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra, aptly stated:

"[T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." (Id. at 392).

\* \* \*

"[T]he Fourth Amendment is not tied to the niceties of local trespass laws." (Id. at 393-94). "The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile" (Id. at 394).

\* \* \*

"[T]he federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action." (Id. at 395).

The court believes, however, that federal defendants are protected by another New York statutory provision which applies to law enforcement officers in the performance of their duties. That statute reads:

The following actions shall be commenced within one year:

1. an action against a sheriff, coroner or constable, upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty, except the non-payment of money collected upon an execution.

N.Y. CPLR §215(1).

The fourth amendment operates as a limitation upon "official conduct." Although this court, constrained by authority, ruled that the cause of action alleged here, founded as it is upon the Constitution, imposes a personal liability and therefore defendants must be sued in their individual and not their official capacities, it cannot be gainsaid that the cause of action in fact grows out of acts of defendants performed within the outer perimeter of their authority as federal agents. Thus the liability sought to be imposed rightfully may be said to have been incurred by defendants doing acts in their official capacities.

It remains only to ascertain whether application of the State statute unfairly discriminates against a cause of action arising under a federal statute. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942); Caldwell v. Alabama Dry Dock & Shipbuilding Co., 161 F.2d 83 (5 Cir. 1947). See Swan v. Board of Higher Education, supra, 319 F.2d at 60. The court concludes that a one-year period does not so intrude.

A claim arising out of an arrest situation--state or federal--is, as here, most often of the "confrontation" type and usually accompanied or followed by prompt appearances in a police station or before a court or magistrate. There appears to be no good policy reason for allowing a plaintiff claimed to be injured by such law enforcement action to have more than one year in which to discover whether his constitutional rights were violated. Law enforcement officers would be placed at a

distinct disadvantage and effective action in making arrests would inevitably be inhibited if such officers had to wait for two, three or more years to find out whether or not they would be subject to some large civil liability at a time when memories were dim and witnesses and records perhaps not available.

This is undoubtedly the sound reason for New York's one-year limitation period. When judges and prosecutors are given complete immunity for their actions, the court should not be quick to extend the potential liability of those who perform the essential and often hazardous task of bringing accused persons before the court.

The court therefore holds that the one-year statute of limitations of New York's CPLR §215(1) applies to plaintiff's cause of action founded upon the Constitution and that the claim is time-barred as against the federal defendants.

## II

The federal defendants also move for judgment on plaintiff's claim under the Civil Rights Act of 1861, 42 U.S.C. §1985, which provides that an action for damages may be maintained against persons who have conspired to interfere with one's civil rights.

An essential element of a claim under §1985 is the existence of a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators'

action." Griffin v. Breckenridge, 403 U.S 88, 102 (1971).

It appears from the face of the pleadings that the requisite animus is lacking and that no claim based on any racial or class-based invidious type of discrimination is alleged. See Arnold v. Tiffany, 487 F.2d 216 (9 Cir. 1973) cert. denied, 415 U.S. 984 (1974). Defendants' motion dismissing the claim under 42 U.S.C. §1985 is therefore also granted.

### III.

Defendants finally move for judgment on all claims under New York law on grounds that they are barred by the applicable New York statute of limitations for intentional torts, CPLR §215(3). Plaintiff does not dispute that the one-year limitation applies, see Constant v. Kulukundis, 125 F. Supp. 305 (S.D.N.Y. 1954), but argues that the torts sued upon accrued within one year of commencement of his action.

Plaintiff argues that his claim of defamation is continuing in nature and accrued, not on the date the first act constituting the tort was committed, but rather on the date of each subsequent injury. Under New York law, however, a cause of action for defamation arises when the defamatory material is first made public. Gregoire v. G.P. Putnam's Sons, 298 N.Y. 119 (1948); Sorge v. Parade Publications, Inc., 20 App. Div. 2d 338, 247 N.Y.S. 2d 317 (1st Dept. 1964).

The first act of alleged defamation, the publication of newspaper articles stating that plaintiff had been arrested

and charged with robbery, occurred November 17, 1973. This was more than one year prior to the commencement of this action.

Plaintiff's second contention, that a police officer's use of a photograph for identification purposes is of a defamatory nature is without merit. Nor does such an act constitute an invasion of privacy under New York Civil Rights Law, §50, et seq. That law bars commercial use of a photograph. Rand v. Hearst Corp., 26 N.Y. 2d. 806 (1969). Absent the use for purposes of trade or advertising one's facial characteristics are not the subject of privacy under New York law.

The court must conclude that all pendent State law claims are time-barred, as beyond the one-year limitation period of CPLR 215(3).

In any event, in light of the dismissal of the federal claim, it is clear that absent any independent federal jurisdictional basis, the pendent State law claims must also be dismissed. Aldinger v. Howard, \_\_\_\_ U.S. \_\_\_\_ (1976), 96 S.Ct. 2413; Kavit v. A.L. Stamm & Co., 491 F.2d 1176, 1180 (2 Cir. 1974).

Accordingly, federal defendants' motion for judgment on the pleadings is granted on all claims against them. There being no just reason for delay, the Clerk of the Court is directed to enter judgment in favor of defendants Joseph

F. Sullivan, George Van Nostrand, Francis R. Jules and  
Donald J. Grattan dismissing the complaint as to those  
defendants. Rule 54(b), F.R.Civ.P.

SO ORDERED.

Edward R. Neaker  
U. S. D. J.

Dated: Brooklyn, New York  
July 30, 1976

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- x

JAMES F. REGAN, :  
Plaintiff, : 75 C 139- against - : NOTICE OF PLAINTIFF'S MOTION  
JOSEPH F. SULLIVAN, et al., : MOTION FOR JUDGMENT ON THE  
Defendants. : PLEADINGS

----- x

PLEASE TAKE NOTICE that pursuant to Fed.R.Civ.P. 59(e) and Rule 9(m) of the General Rules for the Eastern District of New York, the undersigned will move for an order granting re-argument of Defendants' Motion for Judgment on the Pleadings with respect to the question of the application of the statute of limitations to plaintiff's Bivens cause of action, and, if reargument is granted, for an order denying the Defendants' Motion at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on August 23, 1976 at 10:00 in the fore-noon of that day or as soon thereafter as counsel can be heard, and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York  
August 12, 1976

GUGGENHEIMER &amp; UNTERMYER

By Adam Brodsky  
For the Firm  
Attorneys for Plaintiff  
James F. Regan  
80 Pine Street  
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TO: DAVID G. TRAGER  
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W. BERNARD RICHLAND  
Corporation Counsel  
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Municipal Building  
New York, New York 10007  
Attn: Saul Bernstein

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

JAMES F. REGAN, :  
Plaintiff, :  
-against- : 75 C 139  
JOSEPH F. SULLIVAN, et al., : AFFIDAVIT  
Defendants. :

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

DAVID M. BRODSKY, being duly sworn, deposes and says:

1. I am associated with Guggenheimer & Untermeyer, attorneys for the plaintiff in this action, and am fully familiar with the facts of this matter.

2. I have been involved in the affairs of plaintiff since the early morning of November 16, 1973, when the firm of Guggenheimer & Untermyer was retained to represent Mr. Regan in connection with his arrest for armed robbery.

3. After arrest on November 15, 1973, Mr. Regan refused to waive the preliminary hearing on probable cause, despite the Government's request to do so, and accordingly on November 27, 1973 the Government dismissed the criminal complaint. However, because no preliminary hearing was held,

neither Mr. Regan nor myself was able to learn the alleged basis for probable cause for his arrest.

4. From November 16, 1973 until the week of March 11, 1974, I spoke at least once a week with various Assistant United States Attorneys in connection with the continuing investigation and threat of a grand jury proceeding involving my client. During our conversations, I continually inquired into the alleged basis for probable cause and each time the Government refused to provide me with such information.

5. On one such occasion, I was told by then-Chief Assistant United States Attorney Edward Boyd that, despite the fact that no indictment had yet been returned, he would "get our man". In addition, I was told by other Assistant United States Attorneys that an eyewitness had positively identified Mr. Regan as being one of the armed robbers.

6. Under these circumstances I attempted to secure proof that Mr. Regan was not at the warehouse when the robbery occurred but, in fact, was at his place of employment at Seaboard World Airlines Terminal. I interviewed many of plaintiff's co-workers and on March 14, 1974, received affidavits from them establishing that Mr. Regan had not left his place of employment during the evening of the robbery.

7. On March 15, 1974, I presented these affidavits (Exhibit A) to the Assistant United States Attorney then in charge of the investigation, who told me that the investigation was still open. This confirmed my view that the U. S. Attorney's Office would carry through on the implied threat by Mr. Boyd to "get" Mr. Regan.

8. Under the circumstances, it was just not reasonable for Mr. Regan to commence an action for violation of his constitutional rights for fear that an unlawful indictment would be sought in retaliation for bringing this action.

9. Accordingly, only after some ten months after my conference in March 1976 had gone by without indictment, did Mr. Regan feel that he would not jeopardize his legal position as a target of the investigation by commencing the action herein. Accordingly, he commenced this action approximately fourteen months after the date of his arrest and the dismissal of the criminal complaint against him.

10. Throughout this proceeding, the federal defendants have refused to disclose the basis for probable cause for plaintiff's arrest. The affidavits submitted by defendants Sullivan, Van Nostrand and Jules in support of defendants' motion for summary judgment, while profusely stating that they acted with good faith that probable cause existed, at no time disclosed what that probable cause was or the basis for

their "good faith belief".

11. I have been advised by my associate Joan Ross Sorkin that on August 4, 1976 Prosper Parkerton, the Assistant United States Attorney in charge of the civil action, showed her a telegram from the Attorney General of the United States, Edward Levi, directing certain federal deponents not to produce documents sought by plaintiff in this case on the ground that the investigation of the robbery is still on-going. This telegram confirms the Government's position presented to the Court on a preliminary basis by Mr. Parkerton during the status hearing held on July 28, 1976. Although Mr. Parkerton did not supply Mrs. Sorkin with a copy of said telegram and has not yet provided us with an official written refusal to produce the requested documents, it is clear that this is the position of the Government. Consequently, even to date, the Government refuses to disclose to plaintiff the basis of probable cause for his arrest.

12. These circumstances demonstrate the need for a special tolling provision for causes of action under § 1983 and Bivens arising out of arrest situations. It defies reality to deny that an arrested person, whether or not he believes himself innocent, will justifiably hesitate to file an action against his arresting officers until the criminal investigation has terminated or at the very least until the alleged

probable cause for arrest is disclosed. What is required in circumstances of this type is judicial recognition of the problems posed by this type of action.

WHEREFORE, I respectfully request that plaintiff's motion for reargument be granted and defendants' motion for judgment on the pleadings be denied.

DAVID M. BRODSKY  
DAVID M. BRODSKY

Sworn to before me this  
12<sup>th</sup> day of August, 1976.

Steven Dreyer  
Notary Public

STEVEN D. DREYER  
Notary Public, State of New York  
No. 31-6100810  
Qualified in New York County  
Commission Expires March 30, 1978

AFFIDAVIT

STATE OF NEW YORK )  
: SS.:  
COUNTY OF QUEENS )

MICHAEL PESALE, being duly sworn, deposes and says:

1. I am a leadman of a work crew at Seaboard World Airlines.

2. On the evening of November 12, 1973, I was alerted that a Brinks silver shipment was to be unloaded and that I would need extra men.

3. I saw James Regan in his work uniform that evening and he helped unload the Brinks silver shipment at around 9 P.M.

4. After the Brinks silver shipment the crew, including Regan, went to Airport City at 10:15 P.M. to have something to eat.

5. Later that evening Regan and I worked on the overtime shift from 12 midnight to 4 A.M. and Regan took me home that evening.

6. From the time that I began working on the evening of November 12, 1973 until the time we left to go home Regan could not have been absent from the work area for more than fifteen minutes without my knowing it; to my knowledge he was not absent at any time for more than fifteen minutes that evening, if at all.

Michael Pesale  
MICHAEL PESALE

Sworn to before me  
this 14<sup>th</sup> day of March, 1974  
I. Bruce J. Senn

ROBERT J. BREWSTER  
Notary Public, State of New York  
No. 11-2512776  
C. 1974

EXHIBIT A

AFFIDAVIT

STATE OF NEW YORK)

NAME : SS. :  
COUNTY OF QUEENS

TOIYO E. AROKSAAR, being duly sworn, deposes and says:

1. I am employed by Seaboard World Airlines as a supervisor.
2. On the evening of November 12, 1973, I was on duty at Seaboard's <sup>ChrgCrt</sup> Building. ~~Building~~ I knew and was expecting that a silver shipment was going to be coming into Seaboard that evening.
3. At about 8:30 P.M. on November 12, 1973, I went into the lunchroom at Seaboard looking for Mike Pesale, the leadman of the group that was going to unload the silver shipment. He was not in the lunchroom, which was not open for business, but while there I saw James Regan, a member of Pesale's group in the room.
4. At about 8:40 or 8:45 P.M., I had not yet found Pesale and again saw Regan and told him that the silver shipment had come in and he should get the other men together to prepare to unload it.
5. At around 9 P.M. I saw Pesale, Regan, and the other men working on the silver shipment.

Toiyo E. Aroksaar  
Toiyo E. Aroksaar  
T.S.

Sworn to before me

this 14 day of March, 1974Bruce T. Fier

PETER J. FERRANTI  
Notary Public, State of New York  
Reg. #1451275  
Qualified in New York County  
Commission Expires March 30, 1975

AFFIDAVIT

STATE OF NEW YORK)  
: SS.:  
COUNTY OF QUEENS )

RUDOLPH KOLINGER, being duly sworn, deposes and  
says:

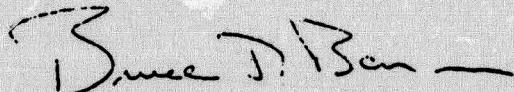
1. I am employed by Seaboard World Airlines and work the 4 P.M. to 12 midnight shift.
2. On November 12, 1973 I saw James Regan in the area of the cafeteria which had just closed at around 8:30 P.M. I sat with him in the area and talked for about fifteen minutes.



Rudolph Kolinger  
RUDOLPH KOLINGER

Sworn to before me

this 14th , of March, 1974



Bruce J. Beaman

BRUCE J. BEAMAN  
Notary Public, State of New York  
No. 31-4512776  
Qualified in New York County  
Commission Expires March 30, 1975

AFFIDAVIT

STATE OF NEW YORK)  
: SS.:  
COUNTY OF QUEENS )

VINCENT BATTAGLIA, being duly sworn, deposes and  
says:

1. I am employed on the 4 P.M. to 12 midnight shift  
at Seaboard World Airlines.

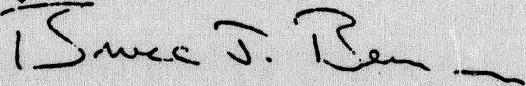
2. On the evening of November 12, 1973, at 8:15 P.M.,  
I saw James Regan unloading a truck. At around 8:20 or  
8:25 P.M. I saw Regan going into the lunchroom.

3. At around 8:50 or 9 P.M. the Brinks silver  
shipment began to be unloaded and I saw Regan unloading it  
with us.

  
VINCENT BATTAGLIA

Sworn to before me

this 18<sup>th</sup> day of March, 1974



BRUCE J. BERMAN  
Notary Public, State of New York  
No. 21-45127-6  
Qualified in New York County  
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK----- x  
JAMES F. REGAN,

Plaintiff, : 75 C 139

-against- : NOTICE OF APPEAL

JOSEPH F. SULLIVAN, et al.,

Defendants. :

----- x  
S I R S:

PLEASE TAKE NOTICE, that the plaintiff in the above-captioned case hereby appeals to the United States Court of Appeals for the Second Circuit from the Memorandum and Order entered in the United States District Court for the Eastern District of New York on August 2, 1976 dismissing the plaintiff's Amended Complaint with respect to defendants Joseph F. Sullivan, George Van Nostrand, Francis R. Jules and Donald J. Grattan.

Dated: New York, N.Y.  
August 24, 1976

Yours, etc.

GUGGENHEIMER & UNTERMYER  
Attorneys for Plaintiff  
80 Pine Street  
New York, New York 10005  
(212) 344-2040

To:

DAVID G. TRAGER  
United States Attorney  
Eastern District of New York  
Attorneys for Defendants  
Sullivan, Van Nostrand,  
Jules and Grattan  
225 Cadman Plaza East  
Brooklyn, New York 11201  
Attn: Prosper K. Parkerton  
Assistant U.S. Attorney

W. BERNARD RICHLAND  
Corporation Counsel  
Attorney for Defendants  
Harkins & Greenwald  
Municipal Building  
New York, New York 10007  
Attn: Saul Bernstein

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x

JAMES P. REGAN,

Plaintiff,

-against-

75 C 139

JOSEPH F. SULLIVAN, et al.,

Defendants.

-----x

MEMORANDUM ORDER

Plaintiff's motion for reargument on the question of the statute of limitations applicable to his Bivens-type cause of action is denied. The court adheres to its prior ruling that CPLR §215(1), which provides a one-year period for actions against certain State officers for liabilities incurred by doing acts in their official capacities, is controlling and that plaintiff's Bivens claim is therefore time-barred.

The court remains of opinion (1) that an action for money damages for violation of plaintiff's constitutional rights, founded directly upon the Constitution, is not a liability created or imposed by statute which would bring

CPLR §214(2) into play; (2) that the court should look to State law to determine the most appropriate rule of decision and not fashion a unique federal rule; and (3) that the period applicable to suits against such officers for acts in their official capacities does not violate the law of the case inasmuch as the court's prior ruling concerned the issue of whether personal liability was to be imposed.

SO ORDERED.

/s/ EDWARD R. NEAHER

U. S. D. J.

Dated: Brooklyn, New York  
September 24, 1976

RECEIVED  
U. S. ATTORNEY

OCT 29 2 27 PM '76

EAST. DIST. N.Y.

Frank  
Gannon